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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH GARCIA, Defendant and Appellant.	C061347 & C061662 (Super. Ct. Nos. 07F10342, 06F05769)

In August 2006, defendant Joseph Garcia entered a plea of no contest to one count of first degree burglary in case number 06F05769. The trial court suspended imposition of sentence and placed defendant on probation. In November 2007, the prosecutor filed a petition to revoke defendant's probation based on his commission of an assault with a gun in September 2007.

In December 2008, a jury convicted defendant in case number 07F10342 of the September 2007 firearm assault, and sustained allegations of personal use of a gun and personal infliction of great bodily injury. After receiving the verdicts, the trial

court sustained a recidivist allegation and found that defendant was in violation of probation. It imposed sentences to state prison in the two cases. Defendant filed a notice of appeal in each case. On the motion of the People, we consolidated the two appeals for purposes of argument only.

In case number 07F10342, defendant argues that the trial court erred in failing to instruct on antecedent threats (as an aspect of assessing whether he reasonably resorted to self-defense) because it believed this does not apply to *recent* antecedent threats; in giving instructions on "mutual combat" principles; and in failing to define "mutual combat" on its own motion. He has filed a nearly identical brief in case number 06F05769, claiming he is entitled to a reversal of that judgment as well without explicitly connecting any error in his trial with the finding of a violation of his parole. We affirm both of the judgments.

FACTS

The facts underlying the 2006 burglary are not relevant to the defendant's arguments. We therefore omit them.

Defendant's sister was celebrating her birthday at a large party in the backyard of a relative's home in September 2007. The victim and his close friend (whom witnesses called "O") arrived around 10:00 p.m. with their girlfriends (one of whom was a cousin of defendant and his sister, the other of whom was a longtime family friend). When he arrived later, defendant was introduced to the victim. There did not seem to be any animosity between them. In meeting O, defendant testified that

he did not feel any hostility toward O initially, but a witness said the two exchanged mean looks from the start.

When O later began talking about the gang with which he was affiliated and doing some sort of dance tribute to it, a witness said that defendant did not appear to like it and that the victim attempted to smooth things over between them. Defendant, however, denied that the dance moves triggered any reaction from him.

Defendant caught the eye of the victim's girlfriend (his cousin) and started to lift up his shirt; she turned away, afraid that he might be showing her a gun because "you don't just lift up your shirt for no reason." Defendant then danced with O's girlfriend. Though she was defendant's close friend, this angered O, who began arguing with her. Defendant acknowledged getting angry at O by this point, with talk turning to gang affiliations, but eventually shook hands with O to defuse the situation, reminding him that this was a family party. Defendant's wife (then his girlfriend) testified that at some point inside the house, O and the victim deliberately bumped into defendant, who again told them to cool off because everyone there was family.

Eventually, the victim and his girlfriend told their companions that the latter should leave the party because they were getting too drunk. Not wanting to go, O and his girlfriend went to the front yard. After a while, the victim told his girlfriend he was going to check on their drunken companions out front.

Witnesses (including defendant) testified that at some later point it looked as if O and the victim were getting a gun from the trunk of their car parked in the front of the house. Defendant went into the backyard and phoned his marijuana supplier, asking the supplier to bring a gun to defendant. (Defendant denied bringing a gun with him to a family party.)

Defendant returned to the front yard to see if O and his girlfriend had left. O challenged defendant, who put up his hands; one witness saw a handgun stuck in defendant's waistband as he backed away from O, but defendant testified that he was simply throwing his hands in the air as he backed up and returned to the backyard.

Defendant's supplier arrived and gave defendant the gun, which defendant tucked into the rear of the waistband of his pants. Defendant and his wife walked a female friend to her car, because the behavior of O and the victim made the friend feel uncomfortable. Defendant and his wife both testified that when they walked out front, O *and* the victim challenged defendant to fight them; the victim swung a bottle at defendant. Defendant ducked and grabbed the gun out of his waistband to *hit* the victim with it, because he was afraid the victim would try to hit him with the bottle again. However, when defendant struck the victim, the gun fired (accidentally, in defendant's account). The shot hit the victim in the face, who fell to the ground. Defendant and O exchanged gunshots before defendant ran off after his friend's car down the street.

Defendant's female friend testified defendant and his wife walked her to her car. The friend entered her car and saw two people through the car window. She heard a gunshot and saw one of the two people fall to the ground. She claimed she could not see them clearly without her glasses. Defendant's wife got in the car unbidden. The friend started to drive down the street. Defendant's wife told the friend to stop; defendant got in the car and told the friend to drive off.

DISCUSSION

I

Defense counsel asked the trial court to instruct the jury on the specific principle that it could consider evidence of antecedent threats (in deciding whether defendant's conduct was reasonable) as justifying a person acting more quickly or taking greater measures in self-defense against another who had made the threats. (See CALCRIM No. 3470; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Defenses, § 68, p. 403.) Defense counsel argued that O's prior conduct toward defendant was reasonably associated with the victim. The court agreed that O's conduct could be considered in connection with defendant's response to the victim, but believed the concept of antecedent threats applied only where there was a past history between the parties and not to recent threats between those not previously acquainted. Thus, the court instructed the jury only with the general self-defense principles that in deciding whether the defendant's beliefs were reasonable, it should "consider all

the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed" and "[i]f you find the defendant received a threat from someone else that he reasonably associated with [the victim], you may consider that threat in deciding whether the defendant was justified in acting in self-defense."

The parties have not identified any authority that directly addresses this issue, which renders the factual circumstances of these cases immaterial (it being axiomatic that cases are not authority for issues not expressly considered (*In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1491)). Defendant asserts that the underlying rationale applies equally to antecedent threats closer in time to the act of self-defense, because the effect on a defendant would not be any different; the People simply respond that the rule "is reserved" for threats "on a separate, prior occasion," without providing any analysis in support of this bald contradiction.

While defendant would seem to have the better argument, we do not need to explore the question definitively. The basic instructions on self-defense are "fully consistent" with the concept of antecedent assaults, and an instruction focusing on the subject of antecedent threats simply highlights this aspect of the reasonableness of a defendant's response. (*People v. Garvin* (2003) 110 Cal.App.4th 484, 489 [holding that a trial court as a result does not need to instruct sua sponte on the concept].) Therefore, we disagree with defendant that he is

prejudiced merely because the instructions do not address the issue of antecedent threats of violence explicitly,[1] as this did not "seriously misle[a]d" the jury regarding his right of self-defense or prevent it from considering whether a reasonable person in similar circumstances of ongoing antagonism would have pistol-whipped the victim after the victim swung a bottle (as defense counsel asserted in closing argument).

II

Defense counsel objected to the court instructing the jury on the principles of self-defense applicable in mutual combat. The court overruled his objection. It reasoned that while defendant was not the initial aggressor in the fight with the victim, his continued interactions with antagonistic people over the course of the party after arming himself with the gun could reasonably lead a jury to conclude that he had been attempting to instigate conflict. The trial court therefore instructed on the prerequisites that an initial aggressor or mutual combatant must satisfy before being entitled to act in self-defense (i.e., an effort to break off the fight that is reasonably communicated

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[1] We disagree with the holding in *People v. Pena* (1984) 151 Cal.App.3d 462, which defendant cites and the People ignore, that the failure to include a pinpoint instruction such as this is "presumed prejudicial, requiring reversal" (*id.* at p. 475); this is contrary to the prevailing standard of review that determines if a reasonable probability of prejudice exists from the absence of a pinpoint instruction. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144; *People v. Hughes* (2002) 27 Cal.4th 287, 363.)

to the opponent and gives the opponent the chance to stop fighting).

Defendant argues the evidence is insufficient to establish his implicit consent to a fight with O or the victim. He further contends the trial court could not instruct on these principles of mutual combat over his objection because it is a defense inconsistent with the theory of his case, citing *People v. Breverman* (1998) 19 Cal.4th 142, 157 (*Breverman*). Finally, under a separate heading defendant contends the trial court erred in failing to define "mutual combat" for the jury sua sponte because it has a legal meaning distinct from common understanding, citing *People v. Ross* (2007) 155 Cal.App.4th 1033, 1043-1045 (*Ross*).

A

In claiming insufficient evidence in support of mutual combat, defendant focuses narrowly on the evidence immediately before the victim confronted him, claiming his only purpose *at that time* was to escort his friend to her car. However, in reviewing *all* the evidence we have related above (and not just defendant's account), we conclude the trial court was correct in finding that the jury reasonably could have viewed defendant as a provocateur, who had communicated at least to O *before* the final encounter in the front yard that he was ready to defend himself with a gun if O were to engage him.

B

We cannot fathom defendant's reliance on *Breverman, supra,*

19 Cal.4th 142 (and *People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390). These cases involve the principles defining a trial court's *duty to instruct sua sponte* on defenses. They do not purport to give a defendant veto power over a trial court instructing on relevant limitations on a defense that have support in the evidence.

C

This leaves his claim that the trial court was obligated to explain sua sponte that "mutual" combat means a fight that is the result of antecedent consent (express or implied) between combatants, as explained in *Ross*, *supra*, 155 Cal.App.4th at pages 1046-1047. *Ross* itself does not impose such a duty to act sua sponte; rather, it found reversible error in the trial court's failure to respond to a jury question on the point, and a lack of evidence to support the instruction in the first place. (*Id.* at pp. 1047, 1054.) Recognizing this, defendant asserts that *Ross* identifies "mutual" as having a *technical legal meaning*, which *would* give rise to a duty to define it further on the court's own motion. (E.g., *People v. Bland* (2002) 28 Cal.4th 313, 334 ["proximate cause"].) However, *Ross* did not find "mutual" to be a technical term; rather, it found it could be ambiguous. (155 Cal.App.4th at pp. 1044-1045.) "The fact a word has more than one meaning, some of which are arguably contradictory, does not, without more, mean it is not a commonly understood term and therefore must be defined for the jury." (*People v. Forbes* (1996) 42 Cal.App.4th 599, 606.) In deciding whether *in the present case* it is reasonably likely

that the jury would have found the term ambiguous to defendant's detriment, we may consider the arguments of counsel. (*People v. Kelly* (1992) 1 Cal.4th 495, 527; *People v. Cuevas* (2001) 89 Cal.App.4th 689, 699.) Here, the prosecutor equated mutual combat with "both these guys decid[ing] about the same time and place that they want to mix it up"; defense counsel stated, "mutual combatants, I submit to you, means I will meet you in the front yard. Let's go fight. That's not what happened here. . . . [Defendant] wasn't agreeing to a fight." The meaning of "mutual" therefore did not need further refinement from the trial court sua sponte.

III

As noted, defendant does not make any explicit connection in his briefing in case number 06F05769 between the claimed instructional errors at his trial and his assertion that we must vacate the court's finding that he violated probation. We presume his implicit contention is that it is not clear whether the court based its finding on the mere fact of his conviction or on the evidence adduced at trial. (Compare *People v. Hayko* (1970) 7 Cal.App.3d 604, 611 [court's *only* specified basis for finding of probation violation was fact of conviction; on reversal of latter, must vacate and remand finding] and *People v. McNeal* (1979) 90 Cal.App.3d 830, 840, fn. 3 [court expressly indicated it relied on *evidence* rather than mere fact of conviction; no need to vacate and remand finding of probation violation on reversal of conviction].)

The inadequacy of defendant's briefing on this point aside,

we have not reversed defendant's 2008 conviction. Lacking this predicate, defendant's prayer for the reversal of the finding of a probation violation must fall as well.

IV

The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as defendant's prior and present convictions are "serious" or violent felonies (Pen. Code, §§ 459/460; 12022.7; 667.5, subd. (c)(8); 1192.7, subds. (c)(8) & (18)), so he is entitled to presentence conduct credits only at the prior rate of two days for every four-day period of actual custody (Pen. Code, §§ 4019, subds. (b)(2), (c)(2) & (f); 2933.1).

DISPOSITION

The judgments are affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

RAYE, J.